BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LELAND S. CHASE, Claimant, v. COEUR D'ALENE CRANE & CONSTRUCTION SERVICE, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 00-008980** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed October 4, 2004

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Coeur d'Alene on June 15, 2004. Claimant was present in person and represented by attorney James P. Hannon; Defendants were represented by attorney Gardner W. Skinner, Jr. Both parties presented oral and documentary evidence. This matter was then continued for the submission of briefs and subsequently came under advisement on August 31, 2004.

ISSUES

The noticed issues to be resolved are:

1. Whether Claimant suffered a personal injury arising out of and in the course of employment;

2. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;

3. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

4. Whether Claimant is entitled to temporary partial or temporary total disability (TPD/TTD) benefits, and the extent thereof;

5. Whether Claimant's condition is due in whole or in part to a subsequent injury or cause; and,

6. Whether any of the benefits Claimant would normally be entitled to should be suspended or reduced pursuant to Idaho Code § 72-435.

ARGUMENTS OF THE PARTIES

Claimant argues he was not medically stable when Defendants terminated his workers' compensation benefits in January 2001. He maintains he tore his right rotator cuff in an October 26, 1999, industrial accident, that his shoulder condition still exists, and that he now suffers from severe psychological and emotional stress from his inability to seek medical attention, return to work, and perform normal daily tasks. Claimant further maintains his September 7, 2000, motor vehicle accident (MVA) is a complete non-issue, and that the defense IME "hired guns" should be ignored. He seeks ongoing medical benefits, both orthopedic and psychiatric, and time-loss benefits from the

time his benefits were erroneously terminated.

Defendants argue Claimant's third right rotator cuff tear, as seen on the July 16, 2002, MRI, was probably caused by the MVA. They maintain his industrially-related tear was repaired by Dr. Witham on August 7, 2000, and that there were no other traumatic incidents involving Claimant between the MVA and the MRI. Defendants further argue, that even if the Commission finds the third rotator cuff tear to be related to the original industrial injury, they should not be ordered to provide a third surgery because Claimant continues to smoke against medical advice, and has been ambivalent about actually having the surgery. They also argue Claimant is not entitled to time-loss benefits since he was found medically stable, and that continued benefits based on the remote possibility of surgery are inappropriate and unwarranted, especially since his physician of choice will not operate on him until he quits smoking. While acknowledging Claimant suffers from depression, Defendants argue they are not responsible for the condition, asserting it was caused by the third rotator cuff tear, and the subsequent limitations on his ability to work and support his family as he had done in the past. Defendants further argue that in the event Claimant is found to be eligible for further compensation, any benefits should be reduced or suspended because he has persisted in smoking, preventing any corrective surgery.

Claimant counters the MVA was a very minor accident in which his right arm was immobilized with a sling, and that he reported the incident to his care providers who did not deem it important enough to re-evaluate the rotator cuff repair. He also argues that the fact that he continues to smoke is irrelevant since Surety has denied any further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his spouse, Karen J. Chase, taken at the June 15, 2004, hearing;

2. Claimant's Exhibits A through G, and I and J admitted at the hearing;

3. Defendants' Exhibits 1 through 20 and 22 admitted at the hearing;

4. The deposition of Claimant taken by Defendants on January 29, 2002; and,

5. The deposition of Claimant taken by Defendants on May 22, 2004.

After having fully considered all of the above evidence, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. On October 26, 1999, Claimant injured his right shoulder when a steel I-beam shifted as he was lifting it with his shoulder to allow co-workers to place shims under it. At the time, Claimant, a construction millwright, welder, and equipment operator, was working for Employer at a job site in Post Falls. A March 27, 2000, MRI showed a full-thickness tear of the anterior supraspinatus tendon. On April 14, 2000, Lloyd E. Witham, M.D., performed an open repair of the rotator cuff and acromioclavicular arthroplasty with distal clavicle resection and anterior acromionectomy.

2. Claimant's right shoulder condition initially improved, but then deteriorated. On August 11, 2000, Dr. Witham performed what was anticipated to be an arthroscoptic examination of Claimant's shoulder looking for any post surgery abnormalities. A full-thickness tear of the rotator cuff laterally at the supraspinatus insertion was observed and repaired using an open technique. Dr. Witham characterized the tear as a re-rupture.

3. The cause of the re-rupture is not clear. Claimant believes it occurred immediately

after his first surgery when he, in a reflex motion, tried to stop someone from completing an injection which was extremely painful. The medical records are silent on the matter.

4. On September 7, 2000, Claimant was involved in a MVA while returning to his residence in Rathdrum. Claimant's vehicle was struck by another while turning left off a state highway onto a residential street. Claimant's spouse was driving; he was in the passenger seat. The other vehicle had been stopped at a stop sign, but drove out onto the highway turning left, hitting Claimant's vehicle in the left front quarter panel before Claimant's vehicle could clear the intersection. Claimant's spouse was not injured in the MVA. The damage to his vehicle was minor. The left front tire was replaced, but none of the other damage was repaired.

5. At the time of the September 2000 MVA, Claimant was wearing a sling which restricted movement in his upper right extremity. He demonstrated how the sling immobilized his right arm against his body at hearing. Claimant acknowledged that he felt a "zinger" in his right shoulder during the MVA while trying to reach out and brace himself with his hands. He denied, however, being able to extend his right arm since it was restrained by the sling. Claimant described a "zinger" as a burning and stinging pain similar to what he had felt in physical therapy when his arm was moved too fast, or like a jolt of electricity. He also acknowledged he was not wearing the shoulder portion of his seat belt, only the lap portion.

6. The driver of the other vehicle involved in the September 2000 MVA, Alice E. Bernhart, was cited for failure to yield from a stop sign. Claimant subsequently filed a personal injury lawsuit against Ms. Bernhart. In the complaint he alleged he had "suffered severe permanent injuries to his shoulder" in the MVA. Exhibit 20.

7. Claimant saw Dr. Witham for a routine follow-up examination on September 28,

2000. Dr. Witham noted Claimant had been involved in a MVA, that he was undergoing physical therapy, and that overall, he was doing well with much less pain.

8. Claimant attempted to return to light-duty work with Employer in late October/early November 2000. He worked the better part of three consecutive weeks, but was unable to continue. On November 20, 2000, Dr. Witham noted Claimant was not doing well, and that with heavy lifting, and using vibratory instrumentation and tools, his shoulder was becoming more symptomatic. He then opined Claimant was ready for an impairment rating, and assigned permanent work restrictions of no lifting over ten pounds, no lifting over five pounds overhead, only occasional repetitive right upper extremity activity, and work days no longer than eight to ten hours. These restrictions effectively precluded Claimant from returning to work with Employer. There is nothing in the record to indicate Claimant has worked since November 2000.

9. At Surety's request, Claimant saw Bradley I. Billington, M.D., on January 19, 2001, for an independent medical evaluation (IME). Dr. Billington, an orthopedic surgeon, diagnosed an impingement syndrome of the right shoulder, pre-existing, with arthrosis of the right acromioclavicular joint, aggravated by the work-related October 26, 1999, injury, and a rotator cuff tear of the right shoulder, occurring as a result of the pre-existing impingement syndrome and the industrial accident, with re-tear, both on a more probable than not basis industrially related. He further opined Claimant was medically stable, that he had a permanent partial impairment (PPI) of 17% of the upper extremity, and that he agreed with the physical restrictions imposed by Dr. Witham. Dr. Billington was aware of the September 2000 MVA when he gave his opinion. Claimant had told him he saw the accident coming, that he tried to brace himself on the dash, that he lifted both his upper extremities to brace himself, and that he "stretched and pulled it good." Exhibit

1. Dr. Billington also indicated the medical treatment Claimant had received to date was appropriate.

10. In a February 22, 2001, response to a Surety inquiry, Dr. Witham agreed with Dr. Billington's findings. Based on the IME, Surety terminated Claimant's time-loss benefits and began paying PPI benefits. They continued to authorize some visits to his right shoulder care providers.

11. At the request of the Idaho Division of Vocational Rehabilitation (IDVR), Claimant saw M. J. Carraher, M.D., on February 28, 2001, for a physical examination. The examination was requested by IDVR to determine Claimant's functional limitations prior to providing vocational services. Dr. Carraher restricted Claimant to lifting, reaching, pushing, and pulling no more than 20 pounds with his right arm.

12. Claimant had acquired a GED through the efforts of IDVR. He failed, however, to follow through with IDVR in setting-up a retraining program.

13. On July 26, 2001, Peter C. Jones, M.D., performed a right carpal tunnel release and excision of a right volar wrist ganglion on Claimant. Claimant had been referred to Dr. Jones by his personal physician, D. Cooper Wester, M.D. There is nothing in the medical records to indicate the cause of either the carpal tunnel syndrome or ganglion cyst.

14. Claimant returned to Dr. Witham on December 4, 2001, complaining of pain, and popping and grinding in his right shoulder. He told Dr. Witham he might have damaged the second surgical procedure in a September 2000 MVA. Dr. Witham opined Claimant continued to be symptomatic, but that his shoulder should be functional at clinically demonstrated levels. He further opined Claimant's rotator cuff was intact, that he had mild impingement while his arm was at or above shoulder level, that surgical intervention would not improve his symptoms, and that his

physical restrictions remained in place.

15. In his January 29, 2002, deposition, Claimant stated he tried to reach out with both hands and brace himself on the dashboard immediately prior to the September 2000 MVA impact; he characterized the impact as a good bump, turning the car a little bit sideways. He further stated that although his right arm was immobilized in a sling, he felt a "zinger" in his shoulder, and that after the MVA, his right shoulder hurt and ached a little bit more. Claimant defined "zinger" as a real sharp pain that goes away.

16. Claimant saw Roger C. Dunteman, M.D., on March 1, 2002, complaining of pain in both shoulders, left more than right. In his history, Claimant indicated he was doing well until the September 2000 MVA when he felt something pop, and since that time he has had pain. Dr. Dunteman questioned whether the right rotator cuff had actually healed, and opined heavier use of the left shoulder exacerbated his symptoms there. He recommended Claimant obtain a MRI of his most symptomatic shoulder to determine whether there was a rotator cuff tear.

17. Claimant requested a change in physician from Dr. Wester to Dr. Dunteman. His request was denied in a Commission Order filed June 7, 2002, by Referee Michael E. Powers. Dr. Wester was not Claimant's treating physician for his right shoulder condition and Claimant failed to show Dr. Witham's course of treatment was unreasonable. In addition, Claimant had originally been referred to Dr. Witham by Dr. Wester.

18. Claimant saw Dr. Witham on June 24, 2002, complaining of an inability to perform heavy manual labor with his right arm. Dr. Witham noted Claimant's pain worsened after the September 2000 MVA; he requested permission for a MRI to determine whether there were any structural abnormalities of the right shoulder post-surgery. The MRI was conducted on July 16,

2002. It showed a large defect of the rotator cuff consistent with a full-thickness tear involving the posterior aspect of the supraspinatus tendon.

19. In a letter to Claimant's attorney dated September 4, 2002, Dr. Witham opined Claimant was not medically stable, that he had a full-thickness right rotator cuff tear, that he was doing well in rehabilitation until the September 2000 MVA which was more than likely the etiology of his current shoulder problem.

20. Claimant returned to Dr. Witham on July 23, 2002. In his history, Dr. Witham noted Claimant's right shoulder condition had deteriorated after the September 2000 MVA. Claimant requested a second opinion and Dr. Witham referred him to Dr. Dunteman.

21. Claimant saw Dr. Dunteman on September 18, 2002, for the second opinion. After reviewing the July 2002 right shoulder MRI, Dr. Dunteman opined Claimant had a full-thickness tear of the right rotator cuff. He further opined Claimant had been symptomatic for two years, that the lesion was repairable, and that he would benefit from surgery.

22. At Surety's request, Claimant saw Michael D. Barnard, M.D., on September 23, 2002, for an IME. Dr. Barnard, an orthopedic surgeon, opined Claimant had suffered a rotator cuff tear of the right shoulder, status post repair and subsequent re-rupture and re-repair, related on a more probable than not basis to the October 26, 1999, industrial accident; a re-rupture of the right rotator cuff, related on a more probable than not basis, to the September 7, 2000, MVA; and left shoulder complaints unrelated to either the industrial injury or MVA. He also indicated the mechanism of injury in the MVA was difficult to ascertain since Claimant's right arm was in a sling-and-swath type immobilizer strapped to his chest, while he stated he reached out to brace himself against the dashboard. Dr. Bernard recommended the possibility of a re-repair, but opined the

possibility of a successful rotator cuff repair a third time was very slim, and that Claimant would not respond appropriately to further surgical intervention unless he stopped smoking.

23. Claimant saw Dr. Witham on September 30, 2002. Dr. Witham indicated he basically agreed with Dr. Dunteman's evaluation and conclusion that Claimant had a rotator cuff tear, and that he might benefit from another surgical procedure.

24. Claimant underwent an IME on June 12, 2003, in conjunction with his personal injury lawsuit against Ms. Bernhart. The right shoulder examination was conducted by Linda M. Wray, M.D., and William R. Pace, M.D., at the request of Ms. Bernhart's defense. Dr. Wray is a neurologist and Dr. Pace is an orthopedic surgeon. Claimant, in reciting his medical history, indicated he injured his left shoulder in 2001 while throwing bales of hay off a conveyor belt. He also indicated, that in the September 7, 2000, MVA, he tried to reach forward with his right arm and brace himself, and got a burning "zinger" in his right shoulder. Drs. Wray and Pace diagnosed a rotator cuff tear of the right shoulder, related to the industrial injury of October 26, 1999, status post surgical repair, repeat rupture and second repair, and third re-rupture without subsequent surgery; status post non-industrial left shoulder injury by history; and status post right wrist ganglion cyst resection and carpal tunnel decompression, unrelated to either the industrial injury or the MVA of September 7, 2000. They further opined Claimant's right shoulder condition appeared to be the residuals of his industrial injury and not related to the MVA; that the MVA may have produced a minor straining injury, but that it was highly unlikely to have resulted in a rotator cuff tear since Claimant's right shoulder was protected by an immobilizing sling; and that Claimant would benefit from another open surgery to adequately deal with the remaining rotator cuff defect.

25. Claimant saw Dr. Dunteman on September 10, 2003. Dr. Dunteman indicated the

MRI he had reviewed on Claimant's September 2002 visit showed a recurrent tear of his right rotator cuff. He then discussed Claimant's current condition with him. Of particular concern was Claimant's hypertension. Dr. Dunteman informed Claimant that he did not think he could undergo an operation until he had stopped smoking and got his hypertension under control. He opined at least a diagnostic arthroscopy with an evaluation of the cuff with possible repair was warranted when those conditions were met.

26. In a letter to Claimant's attorney dated October 31, 2003, Dr. Witham opined Claimant was not medically stable because of his torn right rotator cuff, which he further opined was more likely than not related to the September 2000 MVA.

27. In an affidavit prepared by Claimant's attorney, Dr. Dunteman agreed Claimant was not medically stable when Defendants terminated time-loss benefits on January 19, 2001; that Claimant has not reached medical stability; that the September 2000 MVA may have aggravated his industrial injury, but that there was a complete lack of objective proof; that the lack of medical treatment since January 2001 may have caused his injury to worsen; that his injury had directly generated an emotional/psychological trauma component based on his physical limitations, inactivity, and worries about the future; and that as a direct result of his industrial injury he requires an arthroscopic examination of his shoulder with potential surgical intervention to attempt additional repair of the shoulder before a meaningful impairment rating can be given.

28. Defendants deposed Dr. Dunteman on May 4, 2004. He stated Claimant could not undergo a surgical procedure until his hypertension was under control, and that he would not perform a rotator cuff repair until Claimant quit smoking. Dr. Dunteman further stated his belief that an individual who has had failed rotator cuff surgery is less likely to get a good result if they

continue smoking since the smoking inhibits the healing process. He also opined the September 2000 MVA could have aggravated Claimant's shoulder condition, but that it was difficult to tell. Dr. Dunteman indicated if Claimant's arm remained by his side in the sling, even if he heard a pop, his shoulder could have been fine, while on the other hand, if he reached out to brace himself, he could have injured his shoulder. He also indicated extending an arm to brace oneself would place a lot of force on the sutures.

29. At his attorney's request, Claimant saw Tim J. Stoddard, M.D., for a psychiatric evaluation and treatment on May 4, 2004. Dr. Stoddard made a DSM-IV Axis I diagnosis of major depressive disorder which he related to Claimant's incomplete recovery from surgery, the aggravation of his condition, the injury to his opposite shoulder, his unsuccessful job retraining, and his inability to resolve his legal/benefit situation.

30. In a letter to Defendants' attorney dated May 20, 2004, Dr. Barnard indicated he believed the September 2000 MVA contributed to an increase in Claimant's right shoulder symptoms and a re-rupture of his rotator cuff. He further indicated Claimant's reaching out to brace himself probably caused a disruption of the repair or a new tear in a diseased rotator cuff. Dr. Barnard recommended any attempt to re-repair Claimant's rotator cuff not be attempted because of his heavy smoking.

31. Claimant stated at hearing that he would like to proceed with a third surgery, and that he would do his best to stop smoking. He is a heavy smoker, and has been for many years.

DISCUSSION

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The

humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **Injury/Accident (Causation).** The Idaho Workers' Compensation Law defines injury as a personal injury caused by an accident arising out of and in the course of employment. An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102 (17).

A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See*, *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

The records reflect Claimant injured his right shoulder in an October 26, 1999, industrial accident. Claimant's claim for compensation was accepted by Defendants, and a torn rotator cuff

and a re-rupture were surgically repaired by Dr. Witham. The cause of the re-rupture was never established. The first question here, however, is whether Defendants are liable for what they argue is a third tear of the rotator cuff caused by the September 7, 2000, MVA, or, as Claimant argues, a re-rupture of the cuff. The MVA occurred roughly one month after the second surgical procedure.

The existence of the third tear or re-rupture was not positively known until the July 16, 2002, MRI. Prior to that point, however, Claimant's shoulder condition had deteriorated, and he had told both Dr. Witham and Dr. Dunteman that his condition worsened after the September 2000 MVA. After the MRI, Dr. Witham related the newest tear to the MVA. Dr. Barnard, in an IME for Defendants did the same. In another IME conducted for the defendants in Claimant's personal injury case, Drs. Wray and Pace opined the latest tear was casually related to the October 1999 industrial accident. Dr. Dunteman gave opinions seemingly at odds with each other, although each successive one appeared to be based on more information than the preceding one. His final opinion was that the MVA could have aggravated Claimant's shoulder condition, but that it was difficult to tell, since it was not clear what Claimant's actual arm movements were during the MVA. Dr. Dunteman did opine, that if Claimant extended his arm out to brace himself, it would have placed a lot of force on the sutures in his right shoulder.

Questions have been raised by Defendants about Claimant's actions immediately prior to impact in the MVA. It is undisputed Claimant was restrained by the lap portion of his seatbelt, and that his right arm was in a sling attached by Velcro to a sash which basically immobilized his right upper extremity against his body at the time of the MVA. He demonstrated the sling at hearing. Claimant has consistently testified he saw Ms. Bernhart's vehicle approaching and that he attempted to brace himself with his arms against the dashboard. What is not clear is the extent to which he

tried to move his right arm, *i.e.*, the force he exerted in attempting to reach out and brace himself since Claimant has generally indicated his right arm remained immobilized against his body. At odds is his statement to Dr. Billington that he was able to stretch his arm out and "pulled it good." Nevertheless, Claimant has consistently described feeling what he characterized as a "zinger" in his right shoulder when he tried to reach out with his right arm. He has described a "zinger" as a burning and stinging pain, as a jolt of electricity, and as a real sharp pain.

The burden of proof is on Claimant. He must provide medical testimony to support his claim for compensation to a reasonable degree of medical probability. He has not done so. All the medical records must be looked at. The opinions of Drs. Witham, Dunteman, and Barnard outweigh the opinions of Drs. Wray and Pace. The opinions of Dr. Witham, Claimant's treating physician, are particularly persuasive in this matter. Based on the evidence presented, the Referee finds Claimant's current right shoulder condition is not related to the October 26, 1999, industrial accident.

The next question is whether Claimant's current depression is attributable to the October 1999 industrial accident. While Defendants acknowledged Claimant suffers from depression, they deny any liability for the condition. Dr. Stoddard who evaluated Claimant and treated him on several occasions opined Claimant's incomplete recovery from surgery, the aggravation of his condition, the injury to his opposite shoulder, his unsuccessful job retraining, and his inability to resolve his legal/benefit situation contributed to his diagnosis of a major depressive disorder. In reality the incomplete recovery from surgery and aggravation of his right shoulder condition is attributable to the third rotator cuff tear. By Claimant's own admission, the left shoulder condition was caused by throwing bales of hay. The unsuccessful job training is a consequence of Claimant's failure to follow through with IDVR after he received a GED. The inability to resolve his legal

problems is largely attributable to his personal injury lawsuit; Surety has continued to pay for some of Claimant's right shoulder-related physician visits. The Referee finds Claimant's depression is not related to his October 26, 1999, industrial accident.

2. **Remaining Issues.** Based on the above analysis, the Referee finds the remaining issues are moot.

CONCLUSIONS OF LAW

1. Claimant's current right shoulder condition is not related to the October 26, 1999, industrial accident.

2. Claimant's depression is not related to his October 26, 1999, industrial accident.

3. The remaining issues in this matter are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED This 16th day of September, 2004.

INDUSTRIAL COMMISSION

/s/_____
Robert D. Barclay
Chief Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __4th___ day of __October_____, 2004, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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